IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.545 OF 2000

Bablu @ Mohammed Hasan)
Nawab Qureshi)
Muslim aged 25 years,)
Life convict, At present lodged)
in Yerwada Central Prison,)
C/10769, Circle No.II, Barrack)
No.8, Pune-411 006.)..Appellant
(Org.Accused)

Versus

1. The State of Maharashtra)

2) The Inspector of Police)
Byculla Police Station, Mumbai)..Respondents

Mr.M.Y.Sayani for the appellant.

Mrs.U.V.Kejriwal, Addl.Public Prosecutor for the Respondent/State.

Coram : R.M.LODHA &
R.S.MOHITE,JJ

Date : 22.02.2005.

Oral Judgment :- (Per: R.S.Mohite,J)

1. This is an Appeal filed by the appellant Bablu @ Mohammed Hasan Nawab Qureshi (hereinafter referred to as the accused) seeking to quash and set aside the Judgment and order passed by the Additional Sessions Judge, Sessions Court, Greater Mumbai on 20.09.1997 in Sessions Case No.1480/1994. By the impugned Judgment and order, the trial Court has convicted the accused for an offence punishable under Section 302 of the IPC and has sentenced him

to suffer imprisonment for life.

2. The brief facts of the prosecution case were as under :-

(a) That the accused Bablu and the deceased Idris Ansari were both persons who were working at the Byculla Fruit market. One Raes Qureshi (PW 5) was a person who used to conduct business in Gala No.C-57 in the said Fruit market. Mehboom Qureshi (PW 4) was another person working in the fruit market and he used to work in various galas including Gala No.C-57. Abdul Latif (PW 3) was a distant relation of the accused and he was working as a Mathadi kamgar in the said fruit market. Mohamed Qureshi (Pw 2) was a person whose father was a tenant of a gala adjacent to Gala No.C-57 in the Byculla fruit market and who at the relevant time was working alongwith his father in his rented gala.

(b) The incident in question occurred on 2.8.1994 in Gala No.C-57 situated in Byculla fruit market. On that day at about 10.00 A.M., Latif Qureshi (PW 3) had asked the accused, who was his nephew as to what was happening to his earnings and as to why he was neither sending any money to his native place nor depositing any amount with anyone in the market. The deceased Idris was within ear shot of this conversation and he intervened to tell Latif that

the accused used to come late at night and used to spend his money for bidi, cigarettes etc. and was therefore, not in a position to send money. On hearing this the accused had got upset and threatened Idris for defaming him in front of his Uncle. He told the deceased Idris that he would not spare him. This entire incident was also witnessed by Rais Qureshi (PW 5). After threatening Idris the accused had left the spot.

(c) At about 10.30 A.M., the deceased Idris, Mehboom qureshi (PW 4), Latif Qureshi (PW 5), Rais and others were all sitting in the Gala of Latif Qureshi (PW 5). At that time, the accused arrived there but nobody noticed him arriving. The accused then pulled out a knife and gave one blow on the neck of Idris. He then ran away from the spot. Idris then got out of the gala by holding his neck with his hand and went towards the police station. Idris had also sustained an injury on the right arm below the shoulder.

(d) Mohamed Qureshi (PW 2) had also witnessed the assault on Idris while he was standing outside his adjacent gala bearing Gala No.C-58. He had witnessed the incident from a distance of about 15 paces. He put his own hand also on the neck of Idris and took Idris to the Byculla police station.

(e) At about 12.00 noon PI Sharadchandra Hiraman Nemade (PW 7) was the Police inspector at the Byculla police station. At about 12.00 noon, a policeman informed him that an injured person had been brought to the police station. He met the injured. On questioning he learnt that the name of the injured was Idris and that the name of the person who had brought him was Mohamed Qureshi. He saw that the injured was bleeding from his neck. He immediately asked the Constable to put the injured in a taxi and take him for treatment to JJ hospital. He and duty officer PSI Bhosale then followed the injured to JJ hospital, after making necessary entry in the station diary (Exh.23). At the JJ hospital the deceased was admitted to Ward No.4. The Police officer asked the medical officer about his condition and was told that he was not in a condition to give a statement. PI Nemade then made enquiries with Mohamed Qureshi and recorded his statement. Then he made a telephone call to Byculla Police station and got C.R.No.178/94 registered on the basis of the complaint filed by the informant Mohamed. The clothes of the deceased which were blood stained were taken charge of under the panchanama (Exh.16). Thereafter PI Nemade and PI Bhosale returned back to the police station. They entered the seized articles into the muddemal register. On returning, they also learnt from SI Nirdhar that the accused in this case had himself

come to the police station and produced the weapon of assault being a knife and that PSI Nirdhar had taken charge of that knife and the clothes of the accused under a panchanama. Thereafter PI Nemade alongwith PSI Bhosale, police staff and the informant Mohamed went to the scene of the offence. On reaching there, one Rais Ahmed pointed out the exact place of the offence. PSI Nemade prepared the panchanama of the scene of the offence and a green colour slipper said to belong to the accused was seized under a panchanama (Exh.14). On the same day PSI Nemade recorded the statements of several persons including Rais Qureshi (PW 5). In the meanwhile, Idris had expired and at 7.00 P.M. PSI Nemade received his death intimation from JJ hospital. They collected the body and sent the same for post mortem. The crime was altered to one under Section 302 of IPC on the register. Even earlier to this, SI Nirdhar had arrested the accused. On 3.8.1994 Nemade recorded the statements of several witnesses including Abdul Qureshi (PW 3). On 4.8.1994 the brother of the deceased arrived from his native place and identified as well as claimed the dead body which was handed over to him. On 5.8.1994 the accused was sent for ascerting his blood group. On interrogation of the accused it was learnt that the accused had purchased a knife from one Mohamed Shamin and the statement of Mohamed Shamin was recorded. On 18.8.1994 the seized

clothes and the knife were sent to the C.A. On receipt of the post mortem notes and the report of the C.A., on completion of the investigation, PI Nemade filed a charge-sheet on 21.10.1994.

3. At the trial, the prosecution examined as many as 8 witnesses to prove the prosecution case. The prosecution also produced several documents and articles on record. The defence did not lead any evidence. From the suggestion made to the eye witnesses as well as from the 313 statement, it is clear that the defence of the accused was one of total denial. After recording of the 313 statement and after hearing both the sides, the trial court passed the Judgment and order convicting and sentencing the accused as aforesaid, which is impugned in the present appeal.

4. The learned Advocate for the accused submitted that this was not a case where the evidence of the several eye witnesses i.e. Mohamed Qureshi (PW 2), Abdul Qureshi (PW 3), Mehboob Qureshi (PW 4) and Rais Qureshi (PW 5) could be relied upon to secure a conviction. He contended that evidence of these 4 eye witnesses ought to have been dis-believed. He submitted that Mohamed Qureshi (PW 2) and Abdul Qureshi (PW 3) had both refused to support the prosecution case and had been declared as hostile. In so far as the evidence of Mehboob Qureshi (PW 4),

he contended that one of the main facets of the prosecution case i.e. the quarrel between the accused and the deceased ending with a threat given by the accused to the deceased Idris was elicited by the prosecution by putting a leading question, with the permission of the Court. The other material facet of the prosecution case about the accused holding a knife and assaulting the deceased on his right arm and right side of the neck, was also elicited from this witness by putting a leading question without obtaining the required permission of the Court. Relying upon the Judgment of the Apex Court in the case of **Varkey Joseph V. State of Kerala reported in AIR 1993 SUPREME COURT 1892,** it was contended that under Section 142 of the Evidence Act the prosecutor could not put any leading questions on a material part of evidence which a witness intended to give against the accused. It was contended that putting such leading questions on a material part would offend right of the accused to a fair trial enshrined under Article 21 of the Constitution of India and such a procedure was not a curable irregularity. It was further contended that even apart from the aforesaid material incurable irregularity regarding the 2nd facet referred here-in-above, the prosecution had not even obtained the permission of the Court for puting a leading question as required under Section 142 of the Indian Evidence Act 1872. It was then contended that in so

far as the sole remaining eye witness Rais Qureshi (PW 5) was concerned, the evidence of this witness ought to have been dis-carded by the trial Court because there were material omissions amounting to contradictions in his statement. This witness had not stated before the police about the fact of Abdul Qureshi (PW 3) asking the accused as to why he was not saving money and the deceased telling about the late coming of the accused and the consequent threat given by the accused to Idris to the effect that he would not spare Idris. Reference was also made to another omission about the fact of accused coming to the gala without anyone having noticed him. It was pointed out that though this witness talk about blood falling on the ground outside the gala, this fact was not corroborated by the scene of the offence panchanama. It was contended that though the blood group of the deceased i.e. AB group was said to have been found on the clothes of the accused as well as on the knife produced by him, this evidence should not be believed as it was very easy for the police to manipulate such evidence specially in view of the fact that the blood stained clothes of the deceased were also available with the police.

5. On behalf of the prosecution, the prosecutor supported the reasoning of the trial Court. It was argued that the presence of the eye witnesses at the

scene of the offence was natural. That Rais Qureshi (PW 5) was an independent person and there was no reason whatsoever as to why such a person would not speak the truth. It was contended that another eye witness Mehboob Qureshi (PW 4) had seen both the accused and the deceased at the spot. He had also seen the deceased suffered an injury and the accused run away from the spot. Even if the answers elicited by putting leading question were dis-carded the evidence of Mehboob Qureshi (PW 4) could still be used as a corroborative piece of evidence. Similarly, it was urged that the evidence of Mohamed Qureshi (PW 2) and Abdul Qureshi (PW 3) to the extent found reliable, could be used to corroborate the evidence of Rais Qureshi (PW 5). Even though these witnesses were hostile, to the limited extend of supporting the prosecution case on the question of motive arising from an earlier quarrel and about the deceased suffering an injury at the scene of the offence.

6. We have heard both the sides and perused the record. We would first like to deal with the evidence of the eye witnesses and would first take up the evidence of Rais Qureshi (PW 5) for consideration. Rais Qureshi (PW 5) used to conduct business in Gala No.C-57 in the Byculla Fruit market. The incident has taken place in his own gala and therefore, he is a natural witness. He

states that he knew the deceased Idris as well as accused, both of whom were working in the fruit market itself. He states that on 2.8.1994 at about 10.00 A.M. Abdul Qureshi (PW 3) who was the Uncle of the accused asked the accused as to why he was neither saving money nor sending any money to his native place. On hearing this, the deceased Idris who had heard this conversation intervened to say that the accused was used to come late at night and was spending his money on bidi, cigarettes etc. and therefore, was not in a position to save any money. This angered the accused and the accused threatened the deceased that since he had defamed him in front of his Uncle he would not spare him. That half an hour later, he (PW 5), Abdul Qureshi (PW 3) and some other were sitting in his shop. At that time the accused came there. He then assaulted the deceased with a knife by giving a blow on his neck. After giving the blow the accused ran away. Idris got out of the gala by holding his neck with his hand. He went towards the police station. Idris had also sustained an injury on the right arm below the shoulder. The main criticism against the evidence of this witnesses was relating to the earlier incident which resulted in a quarrel between the accused and the deceased and a threat from the accused to the deceased to the effect that the accused would not spare the deceased. Even assuming that Rais Qureshi (PW 5) was not a witness to the

earlier incident relating to the threat, that does not ipso facto lead to a conclusion that he could not have been a witness to the 2nd incident which occured half an hour thereafter in his own gala. It must be remembered that the incident had taken place at about 10.30 A.M., at which time the fruit market would normally working. The presence of Rais Qureshi (PW 5) in his own gala is therefore, most natural. There is no omission or contradiction in the evidence of this witness relating to the main incident of the accused giving a knife blow on the neck of the deceased. We find that the evidence of this witness in so far as such assault is concerned, is reliable. There is nothing in the cross-examination of this witness to suggest that he was in any way an interested witness. We find that the evidence of this witness was quite rightly believed by the trial Court. The trial Court was also right in holding that the evidence of this witness was corroborated by the evidence of other eye witnesses. In so far as evidence of Meboob Qureshi (Pw 4), even if we completely dis-regard the evidence elicited by putting leading questions, there still remains the part of the evidence which could be used to corroborate the evidence of Rais Qureshi (Pw 5). Meboob Qureshi (PW 4) had stated about his hearing the shouts of the deceased Idris, about his immediately turning around and seeing that Idris had got down from the gala and was holding his

hand on his neck and at the same time also noticing the accused running away, out of the gala, from the other side. In so far as evidence of motive is concerned, we find that the evidence of Mohamed Qureshi (PW 2) and Abdul Qureshi (PW 3) about the incident which took place at 10.00 A.M. on that day resulting in a threat being given by the accused to the deceased, has been stated by both these witnesses and has not been shaken in their cross-examinations. This aspect corroborates the evidence given by Rais Qureshi (PW 5). In fact even the omission in the statement of Rais Qureshi (PW 5) may not be a material omission in so far as this pertain to a minor disagreement which took place half an hour earlier. We find that the appreciation of the evidence by the trial Court pertaining to the eye witnesses cannot be faulted and is acceptable.

7. It cannot be lost sight of that the accused presented himself at the police station immediately after the incident. On his surrender, the blood stained clothes on his person and a blood stained knife produced by him was seized at the police station. Both the clothes as well as the knife had on them human blood of AB group, which was also the blood group of the deceased and differed from the blood group of the accused, which was "O" group. We see no evidence on record to indicate any tampering with the articles seized from the accused and in our

view, all this evidence has been rightly used in aid of a conviction by the trial Court.

8. There is however another aspect of this matter which has agitated our minds. Even if the occurance of the incident as alleged by the prosecution is accepted, the question still remains as to what is the offence which was committed. For deciding this question, one will have to look into and analyse the medical evidence adduced on record by the prosecution. It appears from the record that when the deceased was sent to JJ hospital for treatment there was surgical intervention at JJ hospital. One of his jugular vain was found cut and was stiched after a surgical procedure. It appears that several injections were given to the accused and stiches were also put on the wound on the arm. Unfortunately, the prosecution has not brought on record the nature of the original injuries suffered by the deceased. No Doctor who had examined the deceased prior to surgical intervention nor even the surgeon who had operated upon the deceased were examined. The prosecution confined itself to leading the evidence of Dr.Mangesh Ghadge (PW 1) who had performed the post mortem on the body of the deceased at a much later stage. The record indicates that the post mortem was conducted by Dr.Ghadge on 3.8.1994 between 5.00 PM to 6.00 PM. The following external injuries were found by the

Doctor on the body of the deceased :-

1. Surgical venesection Rt.arm. lower 1/3 medially 4 cm with 4 stiches (Intact).

2. A single stich 1.5 cm below ‘above’.

3. Incised wound (Rt) arm upper 1/3 antero-laterally 4 cm below shouder top 11.0 cm X 2.5 cm x muscle deep (gaping) & tailing at upper medial aspect 0.8 cm.

4. Incised wound on front of neck extending from (Rt) Right side neck 7 cm below external ear labule 5.5 cm. below mendiable to front of neck 1 cm below thyroid cartilage 3.5 cm. above suprasternal netch to (Lt) neck front 7.5 cm below mandible @ tailing left side 1 cm Total length 13 cm x 1.1 cm x muscle deep & 5 cm on left side & 8.0 cm (Rt) side from midline.

5. Multiple injection marks on left side chest front over precerdial area.

On Dissection of neck :-

Corresponding to External injuries no.4 cut right side strap muscles @ cut medial part of left sternomastoid @ stiched right Jugular vein stiches intact haemorrhage in surrounding muscle tissue.

. As regards the cause of death, at the time of making of the post mortem notes, the Doctor did not enter any such cause. Instead he called for a histo pathological report. Even after the receiving histo pathological report he did not give any cause of death immediately. He admitted in his evidence that he had entered the final cause of death after receiving the summons to appear in the case as a witness. He admitted that he has made this entry on

16.8.1997 i.e. about 3 years after he his having conducted the post mortem. Even at this stage the cause of death given by him was "Haemorrhage & shock in a surgically intervened neck injuries (unnatural)". In his cross-examination he admitted that he had not mentioned in the post mortem as to which jugular vein has been damaged. He stated that there were 3 jugular veins in a person. He admitted that if the jugular vein had been properly stitched then it would have stemmed loss of blood. He admitted that the hospital papers indicated that blood has been given to Idris and that giving of such blood would have compensated for his previous blood loss. In this state of affairs, when the exact nature of the injury prior to surgical intervention is not on record, we find that it would not be proper to infer and conclude merely from the post mortem notes that the injury caused to the deceased was one which would have been sufficient in ordinary course to cause the death of the deceased. There is nothing in the evidence of the Doctor to suggest that the pre-surgical injuries suffered by the deceased were sufficient in ordinary course to cause his death. Infact this question had not even been asked to the Doctor.

9. In the aforesaid background, we feel that it would be safer to convict the accused for an offence

under Section 326 of the IPC and that it would be unsafe to sustain the conviction under Section 302 of the IPC. We therefore, proceed to pass the following order :-

O R D E R

(i) The Appeal is partly allowed. The conviction of the accused under Section 302 of the IPC and the sentence of life imprisonment imposed upon him is quashed and set aside. The accused is convicted for an offence punishable under Section 326 of the IPC and he is sentenced to suffer rigorous imprisonment for seven years. The Judgment and order passed by the trial Court would stand modified to the aforesaid extent. The appellant would be entitled to the benefit of set-off in respect of the sentence already under-gone by him in accordance with law.

(ii) The appeal stands disposed of accordingly.

(R.M.LODHA,J)

(R.S.MOHITE,J)